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In The

Supreme Court of the United States

October Term, 1989

PEOPLE OF THE STATE OF ILLINOIS,

Petitioner,

vs.

LLOYD PERKINS,

Respondent.

On Writ Of Certiorari To The Appellate Court Of Illinois, Fifth Judicial District

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Both respondent and amici American Civil Liberties Union (ACLU) fundamentally misperceive petitioner's position to be that an exception to *Miranda v. Arizona*, 384 U.S. 436 (1966), should be carved out for undercover activities. (Resp. Br. at 4) (ACLU Br. at 6, 14-16) It is accurate to characterize the holding of *New York v. Quarles*, 467 U.S. 649 (1984), as creating a public safety exception to *Miranda* because there warnings were found not to be required despite the existence of those inherently compelling circumstances contemplated by *Miranda*. However, the undercover scenario does not present those

circumstances and *Miranda's* specific concerns are not triggered in the first instance. Petitioner does not ask this Court to create an exception to *Miranda*, but only to ensure that its "extraordinary safeguard 'does not apply outside the context of the inherently coercive interrogations for which it was designed.' " *Minnesota v. Murphy*, 465 U.S. 420, 430 (1984) (quoting *Roberts v. United States*, 445 U.S. 552, 560 (1980)).

The misperception of respondent and the ACLU arises from their talismanic invocation of "custody" and "interrogation" definitions independently derived from Fifth Amendment precedent of this Court in which undercover questioning was not involved and it was unnecessary to analyze in depth the interplay of both factors as they relate to potential coercion. (Resp. Br. at 5, 8) (ACLU Br. at 7, 8)[1] In *Mathis v. United States*, 391 U.S. 1 (1968), there was no question that the inmate had been formally interrogated by one whom he knew to wield governmental power, and the only issue was whether that authority must precisely reflect the same governmental power resulting in and controlling the inmate's confinement. Similarly, in *Rhode Island v. Innis*, 446 U.S. 291 (1980), there was no question of the suspect's awareness that he was in the immediate custody of the same officers

[1] Contrary to respondent's assertion (Resp. Br. at 4, 5), petitioner has conceded custody only in the factual sense that respondent was incarcerated in an institution at the time he confessed. Despite respondent's suggestion (Resp. Br. at 4, 9), whether he was subjected to "custodial interrogation" for purposes of *Miranda* on the undisputed facts here is clearly a legal question. *See Arizona v. Mauro*, 481 U.S. 520, n. 6 (1987).

who affirmatively subjected him to "subtle compulsion", and the only issue was whether authorities should have known incriminating statements to be the likely result of their actions.[2]

Nor can respondent (Resp. Br. at 7, 8, 18) and the ACLU (ACLU Br. at 8, 17) properly rely on this Court's Sixth Amendment "deliberate elicitation" cases inasmuch as the policies underlying that amendment are distinct from those underlying the Fifth.[3] The Sixth Amendment was designed to ensure that an accused receives necessary "aid in coping with legal problems or assistance in meeting his adversary." *United States v. Ash*, 413 U.S. 300, 313 (1973). The need for professional aid after indictment is not triggered by perceived pressures to speak alone, but even more forcefully by the uncounseled suspect's *failure* to perceive those circumstances rendering a decision to speak unwise. *See United States v. Henry*, 447 U.S. 264, 273 (1980). Thus, the Sixth Amendment imposes on the government an "affirmative obligation not to act in a

[2] Respondent additionally cites *Orozco v. Texas*, 394 U.S. 324 (1969), and *Oregon v. Mathiason*, 429 U.S. 492 (1977), for the proposition that neither familiarity with surroundings nor the existence of an "interrogation environment" is relevant to the inquiry of whether one is in custody. (Resp. Br. at 5, 6) However, *Orozco* merely holds that custodial interrogation can occur even in the suspect's home when he is under the immediate restraint of known police officers. And *Mathiason*, far from finding a coercive environment to be irrelevant, held that *Miranda* is not triggered by such an environment *alone*.

[3] In *United States v. Surridge*, 687 F.2d 250, 253 (8th Cir.), *cert. denied*, 459 U.S. 1044 (1982), cited by the ACLU, the court merely assumed arguendo that the Sixth Amendment deliberate elicitation test applies in the Fifth Amendment context.

manner that circumvents the protections accorded the accused by invoking this right," *Maine v. Moulton*, 474 U.S. 159, 176 (1985), and deliberate elicitation by craft is not consistent with this duty though the circumstances are devoid of compelling influences.

The Fifth Amendment, on the other hand, does not create a right not to confess except knowingly and with the tactical assistance of counsel; "there is only a right not to be *compelled* to confess." Kamisar, *Brewers v. Williams, Massiah* and *Miranda:* What Is "Interrogation"? When Does It Matter?, 67 Geo. L. J. 1, 48 (1978). So too the purpose of *Miranda's* prophylactic safeguards is not to discourage volunteered statements, but to "prevent[] government officials from using the *coercive* nature of confinement to *extract* confessions that would not be given in an unrestrained environment." *Arizona v. Mauro*, 481 U.S. 520, 529-30 (1987) (emphasis supplied). Therefore, while the intent of authorities is relevant in analyzing the forseeability of their actions to ensure requisite governmental involvement, *Innis*, 446 U.S. at 301, n. 7, the critical focus of the Fifth Amendment inquiry must be on the perceptions of the suspect, *id.* at 301-02, which may pressure him to speak. *Berkemer v. McCarty*, 468 U.S. 420, 438 (1984). And while elicitation perceived as official may give rise to a prophylactic presumption of compulsion, it does not follow that elicitation alone requires the same result even when accompanied by incarceration. Instructive on the point is *Henry*, which unlike *Mathis* and *Innis* specifically contemplated an undercover jailhouse scenario:

> It is undisputed that Henry was unaware of Nichols' role as a Government informant. The government argues that this Court should apply a less rigorous standard under the Sixth Amendment where the accused is prompted by an undisclosed undercover informant than where the accused is speaking in the hearing of persons he knows to be Government officers. That line of argument, however, seeks to infuse Fifth Amendment concerns against compelled self-incrimination into the Sixth Amendment protection of the right to the assistance of counsel.

447 U.S. at 272-73. The Fifth and Sixth Amendment distinction can hardly be characterized as "bizarre" (ACLU Br. at 9), particularly where it has been repeatedly emphasized by this Court. (*See* Pet. Br. at 12-13)[4]

The principal argument of respondent and the ACLU is founded on the proposition that *Miranda* requires an inmate's decision to speak to be the product of a "rational" choice (Resp. Br. at 13) and forbids "government efforts to capitalize on the ignorance of suspects and to keep them uninformed of the consequences of incriminating statements." (ACLU Br. at 11) Respondent points out various "psychological ploys" detailed in *Miranda* (Resp. Br. at 18), and the ACLU asserts that, "[l]ike the police

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[4] By proferring independent Argument C, the ACLU appears to suggest that whether the Fifth Amendment permits an undercover cellmate to act as a mere "listening post" is an open question, though *Kuhlmann v. Wilson*, 477 U.S. 436 (1986), held the practice permissible under the Sixth. Because "the Sixth Amendment's protection of the attorney-client relationship . . . extends beyond *Miranda's* protection of the Fifth Amendment right to counsel," *Patterson v. Illinois*, 487 U.S. ___, 108 S.Ct. 2389, 2397, n. 9 (1988), it is clear conduct not amounting to Sixth Amendment deliberate elicitation will not suffice to trigger *Miranda*.

practice of deliberately giving false legal advice condemned in *Miranda*, undercover interrogation lulls the suspect into a false sense of security about the legal consequences of a conversation for the sole purpose of obtaining incriminating statements." (ACLU Br. at 12) However, as noted in petitioner's opening brief at 20, the ploys hypothesized in *Miranda* such as conveying false legal advice tend to instill or reinforce the negative consequences of remaining silent by their substance, professional source, and most importantly by the suspect's common belief that the same authorities seeking a response maintain significant control over his immediate future. In contrast, merely "lulling" the suspect into a false sense of security does not affirmatively encourage him to speak and cannot be deemed coercive in any sense of the word. Quite simply, the suspect is not " '*made* the deluded instrument of his own conviction.' . . . by the simple, cruel expedient of *forcing* [evidence] from his own lips." *Culombe v. Connecticut*, 367 U.S. 568, 581-82 (1961) (quoting 2 Hawkins, Pleas of the Crown 595 (8th ed. 1824)) (emphasis supplied).

Perhaps more understandable is the complaint that undercover questioning of an incarcerated suspect is unfair because authorities have a unique opportunity to exploit his vulnerability by controlling those with whom he comes in contact.[5] Yet even in the Sixth Amendment

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[5] In support of its assertion that "a growing number of state courts" have recognized the inherent unfairness of undercover jailhouse investigations, however, the ACLU cites only one case decided in the last decade. (ACLU Br. at 14, n. 8) It

(Continued on following page)

context *Kuhlmann v. Wilson*, 477 U.S. 436 (1986), held it permissible to deliberately cell the suspect with an unknown government agent acting as a "listening post". It is difficult to see how, in light of Fifth Amendment concerns, the added circumstance of uncoercive questioning suddenly renders the conduct unduly unfair. Subtle questioning, of course, might make it more likely that incriminating statements will be forthcoming. However, from a comparative standpoint the authorized use of an informant in a case like *Hoffa v. United States*, 385 U.S. 293 (1966), is more likely to deceive a suspect than the use of an informant in confinement. "[A] jail shares none of the attributes of privacy of a home, an automobile, an office or a hotel room" because "official surveillance has traditionally been the order of the day." *Lanza v. New York*, 370 U.S. 139, 143 (1962); *Hudson v. Palmer*, 468 U.S. 517, 527 (1984). Prisoners are also savvy enough to realize that fellow inmates are willing to trade the police information incriminating their cellmates in return for favorable treatment for themselves.

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should also be noted that in *Tarnef v. State*, 512 P.2d 923 (Alaska 1973), the suspect knew the "undercover" investigator to be aligned with authorities to the extent that he believed the agent's failure to administer *Miranda* warnings would render the statements inadmissible at a trial. Similarly, in *Commonwealth v. Hamilton*, 285 A.2d 172 (Pa. 1971), statements were made while the suspect was in the immediate custody and presence of known officers. Finally, the relevant observation in *Commonwealth v. Mahnke*, 335 N.E.2d 660 (Mass. 1975), arose in *dicta*.

As noted in petitioner's opening brief at 21-22, coercive undercover behavior will not be the norm.[6] The ACLU specifically points out that a case may arise wherein confessions result from physical intimidation (ACLU Br. at 14, n. 8, 15) First, techniques encouraging confessions to be given directly to known authorities cannot truly be characterized as undercover and therefore are not contemplated by petitioner's argument. Second, only under unique circumstances could agents effectively engender pressure perceived to be extra-legal because the suspect could legitimately respond by immediately seeking aid from known authorities. *Cf. McCarty*, 468 U.S. at 438 (1984) (where potential antagonist is known police officer, significant that routine traffic stop occurs in view of passersby who reduce opportunity for and fear of abuse). Third, the risk that prisoners will *falsely* confess to crimes to impress their cellmates (ACLU Br. at 15-16) is even more insubstantial because it is assumed that "persons do not make statements which are damaging to themselves unless satisfied for good reason that they are true." Notes of Advisory Committtee on Proposed Federal Rules of Evidence, 28 U.S.C. p. 733 (comment to Fed. R. Evid. 804(b)(3) on statements against interest). "Indeed, within weeks after our decision in *Miranda*, we declined to apply that decision retroactively to state prisoners on federal habeas, noting that the *Miranda* rule was

[6] Contrary to respondent's suggestion (Resp. Br. at 11), nowhere has petitioner intimated that governmental coercion could not *conceivably* arise in undercover investigations.

unrelated to the truth seeking function of the criminal trial, and that its application on federal habeas 'would require the retrial or release of numerous prisoners found guilty by trustworthy evidence.' " *Duckworth v. Eagan*, 492 U.S. ___, 109 S.Ct. 2875, 2883 (1989) (O'Connor, J., concurring) (quoting *Johnson v. New Jersey*, 384 U.S. 719, 731 (1966)).[7]

As did the court even in *State v. Atkins*, 446 P.2d 660 (Or. 1968) (en banc) (ACLU Br. at 14, n. 8), the propriety of potentially coercive undercover tactics can be litigated pursuant to traditional concepts of voluntariness. Respondent and the ACLU argue that to follow this approach would undermine the certainty of *Miranda*'s prophylactic rule and require broadened inquiry into the reliability of particular statements. (Resp. Br. at 3) (ACLU Br. at 15) It is true that if *Miranda* is held inapplicable to jailhouse questioning, just as it has been held inapplicable to pre-*Miranda* custodial interrogations and governmental conduct not constituting "custodial interrogation", case-by-case determinations of coercion and reliability will be necessary for purposes of assessing Fifth Amendment and Due Process claims. But this is the inevitable consequence of ensuring that law enforcement is not deprived of legitimate and effective techniques which pose no substantial risk of jeopardizing constitutional rights.

[7] The ACLU also erroneously assumes that prosecutors will increasingly utilize prisoner confessions as "the sole evidence in criminal trials." (ACLU Br. at 16) In the majority of jurisdictions, including Illinois, a defendant cannot be convicted on the basis of his uncorroborated confession alone. *See Smith v. United States*, 348 U.S. 147 (1954); *People v. Hubbard*, 38 Ill.2d 104, 230 N.E.2d 220 (1967).

Finally, the ACLU's attempt to unmask actual coercive influences in the present case is not well-conceived. It is simply ludicrous to suggest that the escape-planning ruse employed here "almost required" that respondent confess to the murder of Richard Stephenson. (ACLU Br. at 16-17) First, even respondent appears to agree that statements concerning an on-going criminal conspiracy are not protected by *Miranda*. (Resp. Br. in Op. to Pet. for Cert. at 6) Second, because Agent Parisi himself was posing as a professional killer, nothing in the nature of the ruse could be said to have pressured respondent into admitting a past violent act, much less into a lengthy, detailed murder confession. An inquiry as to whether respondent had killed anyone, unaccompanied by any intimation that negative consequences would follow absent an admission, can hardly be termed "police action at its most aggressive." (ACLU Br. at 17)

Agent Parisi did not use a custodial setting to extract respondent's confession, since he did not even subtly invoke the legal authority of his badge or the extralegal authority of his nightstick to elicit statements. What Agent Parisi did was to lull respondent into confessing by taking advantage of respondent's misplaced trust in one whom he believed to be a co-conspirator. But that is deception, not coercion. As this Court recognized in *Hoffa*, because the two are different in fact, no alchemy can treat them as the same in law.

CONCLUSION

For the foregoing reasons, and those set forth in their opening brief, the People of the State of Illinois respectfully request that the decision of the Appellate Court of Illinois, Fifth Judicial District, be reversed.

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